ABSTRACT:

Conditions of Contract for Construction, The Red Book 1999 also known as FIDIC Red Book issued by Federation Internationale des Ingenieurs Conseils also referred to as the International Federation of Consulting Engineers is a standard form of contract for engineering construction and for the provision of mechanical and electrical plant. While Standard Form of Contract to be used where Bills of Quantities Form Part of the Contract, PWD 203A (Rev. 2007) often referred as PWD 203A issued by Public Works Department is the contracts for public works in Malaysia. Even both forms have been used widely in construction industry, there are still lack of understanding on both forms especially matters pertaining to liabilities, duties, risks allocations, conditions, procedures and method of disputes settlement. Therefore the aim of this paper is to make a comparison between FIDIC Red Book and PWD 203A in terms of its liabilities, express and implied duties, risk allocations, conditions, procedures and method of disputes resolutions. Aims are achieved through literature review. Finding shows that there are differences and similarity in the provision provided and local forms are more preferred compared to the international form. This paper will contribute knowledge and exposure to the construction industry players and also academician in understanding provisions allocated in both forms of contract.

Keywords: comparison, FIDIC Red Book, PWD 203A forms of Contract, liabilities, duties, risks allocation, conditions, procedures and method of disputes resolutions.

INTRODUCTION

Standard form of contract is a pre-prepared contract which legally binding between two parties, the Employer and the Contractor. It is in printed form and published by an authority or body of the industry, which is recognized by both parties. The standard form can be consider as non-negotiated contract because all the terms and conditions of the contract has been set out earlier and are not subject to further negotiation or amendment. According to definition by Hayagam and Pathmavathy (2005), standard form construction contracts provide a basic legal framework identifying the rights, obligations and duties of the parties; establish the ambit of the powers and duties of the contract administrative procedures necessary for operation of the contract.

Availability of these various types of forms indicates that the standard forms gain popularity from the construction industry. In fact, the efficiency and effectiveness of standard forms make it become a favour. The construction industry parties prefer to use standard form for their contract due to the reason of administrative, time and cost efficiency. Moreover, the standard form is a legal framework with standardize format, so the construction professionals are more familiar with their limitations, procedures, operations which at last will leads to project efficiency. Instead of this, Nayagam and Pathmavathy (2005) gave their view that as there is a body of judicial pronouncements accumulated over the years on standard forms, there is some certainty in meaning.

In the Malaysian construction industry, there is a wide range of standard forms of contract that is available for the construction industry parties to choose and to adopt such as the standard form contract issued by the Public Works Department of Malaysia, Pertubuhan Arkitek Malaysia, Institute of Engineers of Malaysia and Construction Industry Development Board.
Other than the standard forms which published by the Malaysian local authority and institution, there are some international forms that are also available in the Malaysian construction industry which include standard form of contract issued by the Federation Internationale des Ingenieurs-Conseils, Federation of Civil Engineering Contractors, Joint Contracts Tribunal and etc.

For the purposes of this study, only standard forms with traditional general contracting will be discussed. Standard Form of Contract to be used where Bills of Quantities Form Part of the Contract, PWD 203A (Rev. 2007) often referred as PWD 203A is choosen for local standard form of contract and Conditions of Contract for Construction, The Red Book 1999 also known as FIDIC Red Book is choosen to be the case study for the international standard form of contract. The scope of this paper focus on the construction contract management area only.

The PWD 203A is being used by the Public Works Department of Malaysia (PWD) who responsible for the public works and development. As the PWD 203A is especially use for the Public project, what we concern about is the satisfaction of the construction industry parties when they deal with this type of contract form. Are they satisfied with the PWD 203A or unsatisfied with it? How are they justifying their satisfaction? What are their comment or criticism of the PWD 203A? It is found that in most construction project in Malaysia, the construction industry parties are seldom using the FIDIC Red Book for their project. What is the reason cause to less popularity of the FIDIC Red Book in our local construction industry? It is the due to the reason of the international form may not reflect peculiarities of local law or is it any inadequate and disharmony of using FIDIC Red Book in our local construction industry? Or is it lacks of exploration of the FIDIC Red Book make the industry parties more prefer to use our local standard form? The answer for this problem will be found out through a detail comparative study between the FIDIC Red Book and the PWD 203A.

The aim of this paper is to cater the construction industry a deeper knowledge and better understanding of the FIDIC Red Book and PWD 203A through their comparative study. The objectives of this paper are:

1. To review the FIDIC Red Book and the PWD 203A in terms of their liabilities, duties, risks allocations, conditions, procedures and method of dispute settlement.
2. To identify the differences between FIDIC Red Book and PWD 203A through comparative study

RESEARCH METHODOLOGY

Fundamentally, the data is being collected through the review of literature. The purpose of having literature review is to determine the guidelines and scope of the paper through a deeper review in the Contract Forms which are FIDIC Red Book and PWD 203A. Besides, through the review of both forms, a comparison will be made in terms of their liabilities, duties, risks allocation, conditions, procedures and method of dispute settlement. This helps to identify the differences or similarity of both Forms.

RESULTS AND DISCUSSION

Findings for Objective I
Objective I: to review the FIDIC Red Book and the PWD 203A in terms of their liabilities, duties, risks allocations (natural risks, social risks and economic risks), conditions, procedures and method of dispute settlement

Liability
Both the FIDIC Red Book (Clause 4.1) and the PWD 203A (Clause 10.1) show similarity in the Contractor’s obligations, whereby the Contractor shall construct and complete the works as required under the Contract. The Contractor also shall perform his liabilities as contained in the Contract to safeguard the Employer or the Government interest.

Duty
The Engineer (FIDIC Red Book) and the S.O. (PWD 203A) was the person who had full responsibilities in supervising and carrying out the works in the Contract but they may only exercise the authority that attributed to them under the Contract. Both the FIDIC Red Book and the PWD 203A allow the Engineer and S.O. to delegate their authority to Engineer’s assistant or S.O.’s Representative provided that such delegation is in writing. In the condition where the Engineer’s assistant or S.O.’s Representative fail to disapprove work, plant or material, the Contractor shall not prejudice the right and power of the Engineer or S.O. Instead of this, the Engineer or the S.O. may from time to time give instruction to the Contractor and the contractor shall comply with it regardless such instruction is in writing or in oral.

The Contractor’s duty before the commencement of works is to provide the Performance Security or the Performance Bond as a guarantee for the Employer or the Government. PWD 203A show differences from FIDIC Red Book by providing the option of Performance Guarantee Sum when the Contractor failed to provide Performance bond in time. Instead of this, the Contractor shall effect and maintain the insurance such as Insurance against Personal Injuries and Damage to Property and Insurance of Work. Besides, it is the Contractor responsibility to confirm the proper setting out and correct positioning of the works.

**Conditions and Procedures**

Even both FIDIC Red Book and PWD 203A had set out the causes of delay under provision of extension of time, but the causes as set out in PWD 203A is more complete and specific compare to the FIDIC Red Book.

Under provision of defect liability, it provides that it is the Contractor’s obligations to remedy or make good defect, imperfection, shrinkage and any other fault which may appear in Works during the Defect Liability Period. If there is any defect detected, the S.O. shall issue written instruction to the Contractor to make good defects and the Contractor shall obey such instruction. All the cost for remedying work shall be bear by the Contractor.

Clause 11.3 of FIDIC Red Book provide for provision of Defects Notification Period whereby the period shall not be extended by more than two years. Such provision was not provided in PWD 203A.

Meanwhile, Clause 48.3 [Diminution in Value of Works] of PWD 203A had illuminated that if in opinion of the S.O., it is impracticable or inconvenient to the Government to have the Contractor carry out the remedy work, the Government may recover the loss from money due to the Contractor or Performance Bond. Such provision was not found in the FIDIC Red Book.

Clause 11.5 [Removal of Defective Work] of FIDIC Red Book provided that at situation where such defect and damage cannot be remedied on the site, Contractor may allow to repair such defect and damage off site with the condition the Contractor increase the amount of Performance Security or provide other appropriate security. Such provision was not found in the PWD 203A.

Both forms provided the provision of variation. Principally, the Engineer or the S.O. may issue written instruction to request the Contractor to amend or alternate for any part of work. Clause 13.2 [Value Engineering] of FIDIC Red Book allow the Contractor to submit a written proposal for variation to Engineer. However, PWD 203A is keep silence for the right of Contractor to propose variation.

During the event of Force Majeure, both forms provided that neither the Employer/ Government nor the Contractor shall be in breach of its obligations. Clause 57 (e) of PWD 203A is about the event of pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds where this event was not provided under the FIDIC Red Book.

Under provision of termination, FIDIC Red Book allowed the Employer and the Contractor to terminate the Contract but in PWD 203A, only the Government has the right to terminate the Contract. In condition where the Contractor breach of his duty or obligation or make defaults during commencing of work, the Employer/ Government have the right to terminate the Contract. In the event the Contractor becomes insolvent or giving bribe, the Employer/ Government can terminate the Contract immediately. PWD 203A had specially allocate for Clause 52 [Termination on National Interest] and Clause 53 [Termination on Corruption] which are not found in the FIDIC Red Book.
Payment
Advance payment is a payment paid for the Contractor in advance by the Employer; its provision was set out in Clause 14.2 of FIDIC Red Book but such provision is not provided under the PWD 203A. If the Government think it is necessary to have an advance payment, it may be added under the Special Provision to the Conditions of Contract.

Whenever the Contractor had finished or executed the works, interim payment shall be paid to the Contractor. PWD 203A shows differences from the FIDIC Red Book in term of Interim Payment where Clause 28 of PWD 203A required the S.O. to make a valuation of works executed by the Contractor and unfixed materials and goods delivered to the Site when such value reached the Sum as stated in the Appendix rather than required for the Contractor to apply for Interim Payment.

In order to get the Final Payment, Clause 14.11 of FIDIC Book required the Contractor submit six copies of a draft final statement with supporting documents to the Engineer to get approval, then only the Contractor shall submit a written discharge which confirms the total of the Final Statement represents full and final settlement of all moneys due to the Contractor. Similarly, Clause 31.1 of PWD 203A provide that not later than 3 months after the issuance of the Certificate of Practical Completion, the Contractor shall submit full particulars complete with receipts, voucher records and any documents in writing which may enable the Final Account to be prepared by the S.O.

Risk Allocation
Performance Security or Performance Bond was a type of risk allocation which is provided under Clause 4.2 of FIDIC Red Book and Clause 13 of PWD 203A. It needs to be provided by the Contractor before commencement of the work as a guarantee for the Employer/Government. PWD 203A shows differences from FIDIC Red Book whereby it allows the Contractor to provide Performance Bond in form of Performance Guarantee Sum. Such Performance Guarantee Sum shall be made by deduct the ten percent (10%) from the first interim payments and subsequent interim payment until the amount deducted equivalent to five percent (5%) of the Contract Sum. The amount deducted shall be retained by the Government.

Insurance is another way to distribute the risks to avoid loss and damages for the contracting party. Both forms had set out the provision to have Insurance against Personal Injuries and Damage to Property and Insurance of Works. Under Clause 18.2 [Insurance for Works and Contractor’s Equipment] of FIDIC Red Book, it shows that the Contractor’s Equipment shall be insured but PWD 203A stated that the Contractor’s equipment shall exclude from the insurance of work.

Both of the Contract Forms have provided the provision that the Contractor shall indemnity the Employer or the Government, the Employer’s Personnel from all claims, damages and losses. Clause 17.1 of FIDIC Red Book and Clause 14 of PWD 203A show some similarity, whereby the Employer/Government shall have no responsibility or liability in relation to any accident, damage, injury or death arising from carrying out the works except such these events is caused or contributed to by any act or omission or negligence of the Employer/Government or its agents. Instead of this, Clause 17.1 of FIDIC Red Book had provided that the Employer shall indemnify and hold the Contractor harmless from all claims, damages, losses and expenses which caused by the Employer’s fault but in PWD 203A, it keep silence about the Government’s indemnity to the Contractor.

Method of Dispute Resolution
Clause 20 of FIDIC Red Book and Clause 65 of PWD 203A respectively set out the provision for dispute resolution method. Clause 20.2 of FIDIC Red Book provides that when disputes arise, the parties shall refer such dispute to Dispute Adjudication Board (DAB). However, Clause 65.1 of PWD 203A provides that disputes between the Government and the Contractor shall be referred to the officer named in Appendix for a decision or if the parties fails to receive decision within 45 days or dissatisfied with any decision then such dispute shall be referred to Arbitrator. Different from PWD 203A, the FIDIC Red Book provides Clause 20.5 [Amicable Settlement] where the parties shall attempt to settle the dispute amicably after received the notice of dissatisfaction before bring the dispute to arbitration.

Findings for Objective II
Objective II: to identify the differences between FIDIC Red Book and PWD 203A through their comparative study.

Through the literature review, the differences between the FIDIC Red Book and PWD 203A were been identified and were listed at below:
1. FIDIC Red Book provided that the Employer was the owner of a project but under PWD 203A, the owner of a project was the Government. All the duties of the Employer were set out in Clause 2.0 [The Employer] of FIDIC Red Book but PWD 203A have no clear provisions for the Government’s duty.

2. Under FIDIC Red Book, the Engineer is the people who being appointed and have full responsibilities in supervising and carrying out the works, but in PWD 203A, the person appointed is the S.O.

3. Different from PWD 203A, FIDIC Red Book had set out the provision whereby the Engineer shall not delegate the authority to determine any matter in accordance with Clause 3.5 [Determinations] unless otherwise agreed by both parties.

4. FIDIC Red Book provided that the Engineer may at any time issue instructions and any additional or modified drawings to the Contractor for execution of the works or remedying of any defects but without clearly stated the conditions. While Clause 5.1 of PWD 203A had clearly stated the conditions in which the S.O.’s instructions can be issued.

5. Clause 5.3 of PWD provided that if the Contractor failed to comply with an instruction within 7 days after received a written notice; the S.O. without prejudice may undertake the work or employ another Contractor to execute the work. Such provision was not found in FIDIC Red Book.

6. Clause 4.2 of FIDIC Red Book required the Contractor to deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance. However, Clause 13 of PWD 203A only required the Contractor on the date of the possession of Site shall provide a Performance Bond.

7. If the contractor failed to provide Performance Bond, PWD 203A allowed the Contractor to opt to provide it in the form of Performance Guarantee Sum. The provision for Performance Guarantee Sum was not found in FIDIC Red Book.

8. FIDIC Red Book set out the provision of Insurance for Contractor’s Equipment whereby in PWD 203A there was no such provision.

9. FIDIC Red Book and PWD 203A respectively list out the causes of delays which will entitle to an extension of time. It was found that the causes provided in PWD 203A are more complete and specific than the FIDIC Red Book.

10. Clause 8.4 of FIDIC Red Book provided that the Contractor shall give notice to the Engineer not later than 28 days after the causes of delay becomes aware but PWD 203A did not mentioned about such period or day.

11. Defects Notification Period can be extended as provided under Clause 11.3 of FIDIC Red Book. Such provision was not provided in PWD 203A.

12. PWD 203A set out the provision where the S.O. shall specify in the Schedule of Defects which he shall deliver to the Contractor not later than 14 days after the expiration of the Defect Liability Period for any other default or defect which may appear during the Defects Liability Period and to be made good by the Contractor. Yet, FIDIC Red Book is keep silence for this Schedule of Defects.

13. PWD 203A had provided Clause 48.3 [Diminution in Value of Works]. Such provision was not found in FIDIC Red Book.

14. FIDIC Red Book provided that a variation may be take place either by the Engineer written instruction or by a request of Contractor. However, PWD 203A only mentioned the variation may initiate by the S.O. and keep silence for Contractor’s request of variation.

15. FIDIC Red Book had two provisions that were not found in PWD 203A which were Clause 13.2 [Value Engineering] and Clause 13.3 [Variation Procedure].

16. FIDIC Red Book provided that the Contractor shall give notice to the Engineer with supporting particulars to determine the cost for omitted item. However, PWD 203A provided that the rates in BQ shall be used to determine the price of omission works.
17. FIDIC Red Book had provided Clause 19.3 [Duty to minimize delay] and Clause 19.5 [Force Majeure affecting subcontractor] which are not found in the PWD 203A.

18. Under FIDIC Red Book both the Employer and the Contractor have the right to terminate the Contract, but in PWD 203A Contractor has no right to terminate a Contract.

19. PWD 203A specially allocate for Clause 52 [Termination on National Interest] and Clause 53 [Termination on Corruption] which were not found in the FIDIC Red Book.

20. FIDIC Red Book provided Clauses for suspension by the Contractor but PWD 203A only allow suspension of work by the Government. The Contractor has no right to suspend work under PWD 203A.

21. Clause 14.2 of FIDIC Red Book set out the provision for Advance Payment but such provision is not provided under the PWD 203A.

22. Under provision of Interim Payment, Clause 28 of PWD 203A required the S.O. to make a valuation of works executed by the Contractor when such value reached the Sum as stated in the Appendix rather than required for the Contractor to apply for Interim Payment.

23. FIDIC Red Book stated that within 28 days after receiving relevant statement and supporting documents from the Contractor, the Engineer shall issue to the Employer an interim payment Certificate, and within 56 days after the Engineer receives the Statement and supporting document the Employer needs to pay interim payment. However, PWD 203A provided that the S.O. is required to issue an interim payment within 14 days from the date of such valuation being made. Within 30 days of issuance of interim payment the Government shall made payment to the Contractor.

24. FIDIC Red Book provided that the Contractor shall submit six copies of a draft final statement with supporting documents to the Engineer to get the approval for final payment within 56 days after receiving the Performance Certificate. However, PWD 203A provided that not later than 3 months after the issuance of the Certificate of Practical Completion, the Contractor shall submit full particulars complete with receipts, voucher records and any documents in writing which may enable the Final Account to be prepared by the S.O.

25. FIDIC Red Book provide that the Employer shall also indemnify and hold the Contractor harmless from all claims, damages, losses and expenses which caused by the Employer’s fault. If the PWD 203A, it keep silence about the Government’s indemnity to the Contractor.

26. Under provision of FIDIC Red Book, when disputes arise, the parties shall refer such dispute to Dispute Adjudication Board (DAB). Nevertheless, PWD 203A provided that disputes between the Government and the Contractor shall be referred to the officer named in Appendix for a decision.

27. Different from PWD 203A, the FIDIC Red Book provides provision for Amicable Settlement where the parties shall attempt to settle the dispute amicably after received the notice of dissatisfaction before bring the dispute to arbitration. Such provision is not found in PWD 203A.

**SUMMARY**

From the the analysis, it was found that FIDIC Red Book and the PWD 203A show differences and similarity in some provisions of their liabilities, duties, risk allocations, conditions, procedures and method of dispute settlement. Nevertheless, in general it can conclude that they both are suitable for being use in any construction project. Effort should be taken by the Government or Institution or construction industry players to increase the familiarity and explore the provision in the FIDIC Red Book.
REFERENCES


[22] PWD 203A (Rev. 2007), Standard Form Of Contract To Be Used Where Bills Of Quantities Form Part Of The Contract.


